TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00062-CR
NO. 03-17-00063-CR

Ruben Rodriguez, Appellant

v.

The State of Texas, Appellee

FROM THE COUNTY COURT AT LAW NO. 4 OF TRAVIS COUNTY
NO. C-1-CR-14-100077 & NO. C-1-CR-14-00076,
HONORABLE MIKE DENTON, JUDGE PRESIDING

MEMORANDUM OPINION

Following a jury trial in municipal court, the jury found Ruben Rodriguez guilty of the Class C misdemeanor offenses of failing to obtain a site plan, *see Austin, Texas*, *Code* § 25-5-1, and failing to obtain a valid residential building permit, *see id.* §§ 25-11-32, 25-11-241, in connection with Rodriguez's construction of a wall and fence on his residential property in south Austin. After the municipal court denied his motion for new trial, Rodriguez appealed to the county court at law, which affirmed his convictions. *See* Tex. Gov't Code § 30.00014. He now appeals to this Court. *See id.* § 30.00027(a)(1). In our cause number 03-17-00063-CR (building permit),[1] we

[1] Our cause number 03-17-00063-CR is an appeal from the county court at law's judgment in cause number C-1-CR-14-100076, which in turn was an appeal from the municipal court's judgment in cause number 7953533.

will reverse the judgment of the county court at law and render judgment of acquittal. We will affirm the judgment of the county court at law in our case number 03-17-00062-CR (site plan).[2]

Factual and Procedural Background

Rodriguez built a retaining wall and fence and added fill at his property in south Austin in May 2006. After receiving a complaint, the City of Austin investigated Rodriguez's construction.

Over the course of 2007 and 2008, the City filed ten criminal complaints against Rodriguez in municipal court in connection with his construction of the wall and fence on his property. The complaints alleged that Rodriguez had violated various City code provisions, including those requiring site plans and building permits for construction. *See Austin, Texas*, *Code* §§ 25-5-1 (requiring site plan), 25-11-32 (requiring building permit); *see generally id.* §§ 25-1-1-25-13-83 (Land Development). Eight of these ten cases were dismissed on the State's motion with the notation "issues pending w/ city council," and one was dismissed for want of prosecution. The remaining case, which alleged a violation of City code provisions requiring that a person first obtain a building permit before starting construction, *see id.* § 25-1-391 (failure to obtain building permit), resulted in a not-guilty verdict after the municipal court directed a verdict in Rodriguez's favor.

[2] Our cause number 03-17-00062-CR is an appeal from the county court at law's judgment in cause number C-1-CR-14-100077, which in turn was an appeal from the municipal court's judgment in cause number 7944113.

Several years later, in 2013, the City filed four more complaints against Rodriguez in connection with his construction of the retaining wall and fence. Two of the cases have since been resolved and are not at issue here.[3] In the two remaining cases, which are the subject of these appeals, the City charged Rodriguez with failing to obtain a site plan, *see id.* § 25-5-1, and with failing to obtain a residential building permit, *see id.* § 25-11-32, in connection with his 2006 construction of the wall and fence. The complaints alleged that these violations occurred "on or about the 22nd day of May 2013." A jury found Rodriguez guilty in both cases and imposed fines exceeding $4,000. Rodriguez filed a motion for new trial, asserting various grounds for reversal, including double jeopardy, collateral estoppel, limitations, sufficiency of the evidence, and various discovery issues. The municipal court denied Rodriguez's motion.

Rodriguez then appealed his convictions to the county court at law. *See* Tex. Gov't Code § 30.00014(a) (authorizing appeal from judgment or conviction in municipal court of record); *see also id.* § 30.00014(b) (review based on errors set forth in appellant's motion for new trial and that are presented in record). After both Rodriguez and the prosecutor filed briefs, the county court affirmed the municipal court's judgment. Rodriguez now appeals. *See id.* § 30.00027 (authorizing appeal to court of appeals where judgment was affirmed and fine assessed is greater than $100).

Discussion

Our review here is a "second appellate review independent of the determinations made by the first reviewing court, limited to the same challenges presented to the first reviewing

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[3] One was dismissed and in the other, Rodriguez was found not guilty.

court regarding the municipal court's judgment." *Canada v. State*, 547 S.W.3d 4, 12 (Tex. App.—Austin 2017, no pet.). The briefs filed in the county criminal court of appeals constitute the briefs in this Court. *See* Tex. Gov't Code § 30.00027(b)(1); *Canada*, 547 S.W.3d at 12.

Double jeopardy, collateral estoppel, and limitations

Rodriguez contends, in what we have characterized as his first issue, that the municipal court should have dismissed the complaints against him because they violate the double-jeopardy clauses of the federal and Texas constitutions and the related doctrine of collateral estoppel. *See* U.S. Const. amend. V. (providing that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb"), Tex. Const. art. I, § 14 ("No person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after verdict of not guilty in a court of competent jurisdiction."); *see Ashe v. Swenson*, 397 U.S. 436, 445–46 (1970) (noting that collateral estoppel, which precludes relitigation of issue subject to prior final ruling, is embodied in Fifth Amendment's guarantee against double jeopardy). Rodriguez bases his argument on his contention that all of the alleged acts, conduct, code violations, offenses, and issues pertinent to the two cases at issue here were previously and finally litigated in connection with the ten cases filed against him in 2007 and 2008. Stated another way, Rodriguez contends that because he was subject to prosecution for the "same offenses" in the 2007 and 2008 complaints, and because those cases were previously resolved, double jeopardy and collateral estoppel bar his subsequent prosecution for those same offenses. *See, e.g.*, *Ex parte Denton*, 399 S.W.3d 540, 545 (Tex. Crim. App. 2013) (specifying that double jeopardy requires second prosecution or multiple punishments for "same offense"); *Tarter v. Metropolitan Sav.*

& Loan Ass'n, 744 S.W.2d 926, 926–27 (Tex. 1988) (focusing on whether "the same ultimate issue [was] litigated" to determine applicability of collateral estoppel).

With regard to his conviction for violation of City Code section 25-11-32, failure to obtain a building permit (appealed in our cause number 03-17-00063), we agree with Rodriguez. Section 25-11-32 prohibits a person from engaging in certain construction-related activities without "first obtain[ing] the appropriate permit." *See Austin, Texas, Code* § 25-11-32(A)(1). As noted above, the municipal court previously determined, in directing a verdict in favor of Rodriguez, that Rodriguez was not guilty of violating City Code section 25-11-32 in connection with the construction of the same wall, fence, and backfill at issue in this case. The City does not dispute the not-guilty verdict or that the complaint here involves the same alleged violation—i.e., the 2006 construction of the wall and fence—but maintains that the subsequent complaint in 2013 is not for the "same offense" as the previous complaint because it is alleged to have occurred on a different date and the City's code provides that each day a property continues to be in violation is a separate offense. *See id.* § 25-1-462 ("A person who violates a provision of this title commits a separate offense for each day the violation continues."). However, because Rodriguez was previously found not guilty of failing to "first obtain[] the appropriate building permit" before constructing the wall and fence, there could not be an ongoing failure to "first obtain the appropriate permit" for that same wall and fence in the absence of some additional construction or changes to the property. Further, the City acknowledges in its briefs to the county court at law that this case involves the same 2006 wall/fence-building activities, and notes that its complaints on appeal here stem from Rodriguez's previous failure to obtain a building permit before engaging in those activities. Accordingly, the

municipal court's conviction here for failure to first obtain an appropriate permit violates Rodriguez's double-jeopardy rights. We, therefore, sustain the challenge to his conviction in our cause number 03-17-00063-CR.

With regard to his conviction for violation of City Code section 25-5-1, failure to obtain a site plan (our cause number 03-17-00062-CR), we disagree with Rodriguez. The City's previous complaints alleging that Rodriguez had violated this ordinance were dismissed by the municipal court on the City's motion before trial on the merits had begun. As such, jeopardy could not yet have attached. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 597 (1977) (jeopardy does not attach in nonjury trial until first witness sworn or until trial judge receives evidence); *State v. Moreno*, 294 S.W.3d 594, 597 (Tex. Crim. App. 2009) (in jury trial, jeopardy attached when jury impaneled or sworn).

Relatedly, Rodriguez asserts that the municipal court should have dismissed the complaints against him because they were barred by limitations. Violation of a city ordinance, a class C misdemeanor, is subject to a two-year limitations period. *See* Tex. Code Crim. Proc. art. 12.02(b) ("A complaint or information for any Class C misdemeanor may be presented within two years from the date of the commission of the offense, and not afterward."); *Austin, Texas, Code* § 1-1-99(B) (offense under Code is Class C misdemeanor). But because, as noted above, each day of violation—including violations such as failure to obtain a permit or site plan—is a separate offense under the City's code, the limitations period did not run here for offenses alleged within two

years of the complaint. The complaints at issue here, which were issued on August 15, 2013, allege violations occurring "on or about May 22, 2013," which was well within the two-year limitations period.

We overrule Rodriguez's first issue with regard to his failure to obtain a site plan, our cause number 03-17-00062.

Sufficiency of the evidence

In what we have characterized as his second issue, Rodriguez challenges the sufficiency of the evidence supporting the jury's implied findings that his property was in a flood plain and that he "change[d] the use of" or "develop[ed]" the property in question. *See Austin, Texas, Code* §§ 25-5-1 (requiring site plan before, relevant here, "a person may change the use of the property," or "a person may develop property"), 25-5-2(B) (providing exception for site-plan requirement where improvement is not in flood plain or will have insignificant effect on waterway).[4] Our review of the record, including the transcript from the jury trial, shows that there was evidence to support both of these findings. Specifically, Lyle Adair, an environmental compliance specialist with the City of Austin's Environmental Inspection Department, testified that the property in question is in a flood plain and that he used federally issued flood maps to make that determination.

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[4] When reviewing the sufficiency of the evidence, appellate courts view the evidence in the light most favorable to the verdict and determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In this type of review, an appellate court must bear in mind that it is the factfinder's duty to weigh the evidence, to resolve conflicts in the testimony, and to make "reasonable inferences from basic facts to ultimate facts." *Id.*; *see also* Tex. Code Crim. Proc. art. 36.13 (explaining that "jury is the exclusive judge of the facts").

Additionally, the State admitted into evidence maps of the 25-year and 100-year flood plain and the location of Rodriguez's house within those flood plains. Rodriguez questioned Adair on this point during cross-examination, but nothing in Adair's testimony refuted his earlier testimony that the property is in a flood plain. Finally, Rodriguez's own witness testified that Rodriguez's "property backs up to Williamson Creek which is a flood plain." Given our standard of review and in light of the evidence establishing that Rodriguez's property was in the flood plain, we agree with the county court at law that the evidence presented during the trial was legally sufficient to support the jury's determination.

On the issue of whether Rodriguez violated the City ordinance by failing to have a site plan before he "chang[ed] the use of the property" or "develop[ed] the property," we note initially that the ordinances in question define both these terms as follows:

> (30) DEVELOPMENT means the construction or reconstruction of a building or road; the placement of a structure on land; the excavation, mining, dredging, grading, or filling of land; the removal of vegetation from land; or the deposit of refuse or waste on land.
>
> (125) USE means the conduct of an activity, or the performance of a function, on a site or in a structure.

Austin, Texas, Code § 25-1-21 (30), (125) (definitions). Additionally, the undisputed evidence in the record conclusively established that Rodriguez built a wall and fence and added backfill on his property. Given our standard of review and in light of the evidence establishing that Rodriguez built a wall and fence on and added backfill to his property, we agree with the county court at law that the evidence presented during the trial was legally sufficient to support the jury's determination.

We overrule Rodriguez's second issue.

Failure to produce exculpatory evidence

In his final issue, Rodriguez argues that the prosecutor failed to produce exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that suppression by prosecution of material evidence favorable to accused upon request violates due process). Specifically, Rodriguez asserts that the prosecutor failed to disclose the names of all witnesses having knowledge of relevant facts, more specifically the names of any person who had "information indicating that no permit was required," and that the prosecutor "hid witnesses" from Rodriguez.

Our review of the record shows that the prosecutor here provided a list of witnesses having knowledge of relevant facts, including the identity of a City inspector who initially advised Rodriguez that he did not need a permit or site plan. *See Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006) (defendant must show state failed to disclose evidence, that withheld evidence is favorable, and if evidence had been disclosed there is reasonable probably of different outcome). Also, there is nothing in the record to support Rodriguez's assertion that the prosecution "hid" witnesses from him. To the contrary, the record shows that the alleged "hidden" witnesses were not hidden from Rodriguez at all.

We overrule Rodriguez's third issue.

Conclusion

Having sustained Rodriguez's challenge to his conviction for failure to obtain a building permit (our cause number 03-17-00063-CR, county court at law judgment

C-1-CR-14-100076, and municipal court case number 7953533), we reverse the county court at law and the municipal court's judgments, and render judgment of acquittal. Having overruled Rodriguez's issues relating to his conviction for failure to obtain a site plan (our cause number 03-17-00062-CR, county court at law judgment C-1-CR-14-100077, and municipal court case number 7944113), we affirm the judgment of the county court at law.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Goodwin and Field

03-17-00062-CR Affirmed

03-17-00063-CR Reversed and Rendered

Filed: August 31, 2018

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